NO. 43582-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LAVESTER ALEXANDER JOHNSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John A. McCarthy

BRIEF OF APPELLANT

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1-22-2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred in prohibiting appellant from having access to the internet or computers as a condition of community custody.

2. The trial court erred in prohibiting appellant from joining or perusing any public social websites as a condition of community custody.

3. The trial court erred in prohibiting appellant from having contact with physically or mentally vulnerable individuals.

4. The trial court erred in sentencing appellant under RCW 9.94A.712.

5. The jury questionnaires were improperly sealed in violation of the constitutional right to a public trial.

Issues Pertaining to Assignments of Error

1. Did the trial court error in prohibiting appellant from having access to the internet and computers and joining or perusing social websites as a condition of community custody when the conditions are not crime-related?

2. Did the trial court error in prohibiting appellant from having contact with physically or mentally vulnerable individuals as a condition of community custody where the condition is unconstitutionally vague?

3. Did the trial court error in sentencing appellant under RCW 9.94A.712 where the statute has been recodified and does not apply to the crime of child molestation in the third degree?

4. Were the jury questionnaires improperly sealed in violation of the constitutional right to a public trial where the questionnaires were automatically sealed as a matter of policy and without a Bone-Club hearing?

B. STATEMENT OF THE CASE[1]

On June 8, 2011, the State charged appellant, Lavester Alexander Johnson, with one count of child molestation in the third degree, alleging that Johnson committed the crime between March 23, 2011- May 7, 2011. CP 1. The State amended the information on April 11, 2012, changing the period of time to March 1, 2011- May 7, 2011. CP 22.

At trial, 15-year-old C.P. testified that she lives with her aunt, Kierstan Alex, and her three cousins. 3RP 82-83. In March 2011, C.P. went with her aunt and cousins to her aunt's friend's house. Her aunt's friend, Tina Becerra, had just moved into a new home and invited them to spend the night. 3RP 85-87. Beccera lived with her six-year-old daughter Alyssa and a nanny who had a baby. 3RP 87-88. C.P. met Johnson when

[1] There are eight volumes of verbatim report of proceedings: RP - 01/25/12; 1RP - 04/09/12; 2RP - 04/10/12; 3RP - 04/11/12; 4RP - 04/12/12; 5RP- 04/16/12; 6RP - 04/17/12; 7RP - 05/25/12 (sentencing).

he and his cousin arrived at the house. 3RP 85, 88. Johnson also brought his dog and C.P. and her cousins played with the dog. 3RP 89.

Around midnight, C.P. and the other children went to sleep in Alyssa's room. 3RP 95. Sometime between 4 and 5 in the morning, C.P. woke up when she felt Johnson's fingers in between her legs. Johnson rubbed and pushed into her vagina with his fingers over her clothes. He asked her to come downstairs with him but left when she refused. C.P. then got into bed with her cousin who was asleep. 3RP 102-06.

After having breakfast and playing outside with the other children, C.P. came back into the house because she felt tired. 110-12. C.P. was lying down on a bed in Alyssa's room, when Johnson came in and asked her what she was doing. While talking to her, he started rubbing her breast with his hand. C.P. got up and managed to get out of the room. 3RP 113-15.

While C.P. and her cousin Justina were getting dressed to go home, C.P. told her what Johnson did. Justina said she needed to tell Becerra so they went to Becerra's room and C.P. told her what happened. 3RP 116-17. She later told her aunt who called the police. 3RP 120-24.

Tina Becerra, Johnson's girlfriend, testified that C.P. said she was sleeping and dreaming that she had been touched. 5RP 502. C.P. told her that when she woke up, she saw Johnson in the room and she felt like she

had been touched but "she didn't think anything had happened and she was just dreaming." 5RP 502. Johnson testified that he went into Alyssa's room during the night because she was crying so he brought her into her mother's room. 6RP 587, 590-91. He did not have any kind of encounter with C.P. that night or the next morning. 6RP 594-95. Alyssa's nanny testified that she heard Alyssa "crying for her mom" and someone went in her room and took her to Beccara's room. 5RP 535-36. She did not notice anything unusual or out of the ordinary the next morning. 5RP 547.

S.S. was 14 when she was friends with Johnson's daughter Yasmine in 2009. 4RP 304-05. S.S. testified that she spent a night at the Johnson home and the three of them watched television while lying on a bed in Johnson's room. 4RP 324. When Yasmine fell asleep, Johnson started "touching my butt and rubbing in between my legs." 4RP 325. She tried to move away but he pulled her toward him and put his hand between her legs underneath her shorts. 4RP 327. S.S. went home the next day and told her mother who contacted the police. 4RP 329-30.

A jury found Johnson guilty as charged on April 17, 2012. CP 64; 6RP 685-89. On May 25, 2012, the court sentenced Johnson to 14 months in confinement with 36 months of community custody and imposed several conditions of community custody. CP 65-93.

C. ARGUMENT

1. THE TRIAL COURT MADE NUMEROUS SENTENCING ERRORS WHICH REQUIRE A REMAND FOR RESENTENCING.

Sentencing errors may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008)(citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)("In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal."). A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999); In re Postsentence of Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003); State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

a. Access to the internet and computers and joining or perusing public social websites.

A sentencing judge may impose and enforce crime-related prohibitions and affirmative conditions. State v. Cayenne, 165 Wn.2d 10, 14, 195 P.3d 521 (2008); RCW 9.94A.505(8). A crime-related prohibition

is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. . . ." RCW 9.94A.030(13). Conditions that do not reasonably relate to the circumstances of the crime, the risk of reoffense, or public safety are unlawful, unless those conditions are explicitly permitted by statute. State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

In State v. O'Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008), O'Cain argued on appeal that a condition of community custody prohibiting him from unapproved internet access was not crime-related and therefore the trial court erred in imposing it. Id. at 774. Division One of this Court determined that there was no evidence, and the trial court made no finding, that internet use contributed to the crime. The Court held that because the prohibition was not crime-related, the condition must be stricken. Id. at 775.

Here, the trial court imposed the following community custody condition as part of Johnson's sentence: "You shall not have access to the Internet at any location nor shall you have access to computers unless otherwise approved by the Court. You also are prohibited from joining or perusing any public social websites (Face book, MySpace, etc.) CP 82. As in O'Cain, nothing in the record relates access to the internet, computers, or social websites to the crime, risk of reoffense, or public

safety. Consequently, the condition must be stricken because there was no evidence, and the trial court did not find, that the community custody condition contributed to the crime.

b. Physically or Mentally Vulnerable Individuals.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington State Constitution requires that citizens have fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752 (citing City of Spokane v. Douglass, 115 Wn.2d 171, 795 P.2d 693 (1990)); State v. Riles, 135 Wn.2d 326, 348, 957 P.2d 655 (1998). A statute is unconstitutionally vague if it "(1) . . . does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) . . . does not provide ascertainable standards of guilt to protect against arbitrary enforcement." Bahl, 164 Wn.2d at 752 (citing Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)).

In State v. Moultrie, 143 Wn. App. 387, 177 P.3d 776 (2008), Division One of this Court concluded that because there was no indication in the record what the trial court meant by the term "vulnerable" in imposing a condition, it remanded to the court for clarification. 143 Wn. App. at 396-98. The trial court here prohibited Johnson from having "any

contact with physically or mentally vulnerable individuals" as a condition of community custody. CP 81. Over objection by defense counsel, the court imposed all the conditions proposed by the State:

> I am going to sign Appendix H as it is. I understand some of defendant's objection to some of the language. I think those can be dealt with during the course of community custody themselves, and objections to some of those things can be later raised.

7RP 30.

As in Moultrie, nothing in the record reflects what the trial court meant by physically or mentally "vulnerable" individuals. A remand is therefore required because the condition is unconstitutionally vague.

c. Appendix H of Judgment and Sentence

Appendix H of the Judgment and Sentence erroneously states that defendant is sentenced on convictions herein, for the offenses under RCW 9.94A.712. Effective August 1, 2009, RCW 9.94A.712 was recodified as RCW 9.94A.507. Laws of 2008, ch. 231, section 56. However, RCW 9.94A.507 does not apply to Johnson who was convicted of child molestation in the third degree. Appendix H also cites to RCW 9.94A.150 recodified as RCW 9.94A.728 and RCW 9.94A.125 recodified as RCW 9.94A.602 by Laws of 2001, ch. 10, section 6. Remand is required for the trial court to correct Appendix H which cites to statutes no longer in effect. CP 80.

2. SEALING JURY QUESTIONNAIRES WITHOUT A BONE-CLUB HEARING VIOLATES THE CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

Reversal is required because the jury questionnaires were sealed without a Bone-Club hearing in violation of the right to a public trial.

Article I, section 10 of the Washington Constitution provides that "Justice in all cases shall be administered openly." Division One of this Court concluded in State v. Tarhan, 159 Wn. App. 819, 246 P.3d 580 (2011), that a trial court must conduct a Bone-Club[2] analysis before sealing jury questionnaires and the court's failure to do so violates the public's right to open and accessible court proceedings under article I, section 10. 159 Wn. App. at 834. The Court held that the appropriate

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[2] The trial court must perform a weighing test consisting of five criteria:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

remedy is to remand the case for reconsideration of the sealing order in light of Bone-Club and other relevant authority. 159 Wn. App. at 835. Tarhan filed a petition for review arguing that sealing of the jury questionnaires without a Bone-Club hearing violates the right to an open and public trial which constitutes structural error warranting a new trial. The Washington Supreme Court accepted review and a decision is pending (Supreme Court No. 85737-7).

Here, the record reflects that prior to voir dire on April 9, 2012, the court discussed jury questionnaires with both counsel. 1RP 57-60. The record contains no further discussion about the jury questionnaires but the questionnaires were filed and sealed on April 10, 2012. CP 18-20. According to the Clerk's Office, pursuant to a policy established by the presiding judge of the Pierce County Superior Court, jury questionnaires are automatically sealed in all cases. In light of this policy, it is evident that the trial court did not conduct a Bone-Club hearing.

Sealing jury questionnaires without a proper Bone-Club hearing violates Wash. Const., article I, section 22 and article I, section 10 which protects the right to a public trial. The violation of the right to an open and public trial is a structural error and the remedy is a remand for a new trial. See State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009).

Johnson is aware of this Court's decisions in State v. Smith, 162 Wn. App. 833, 262 P.3d 72 (2011)(the court did not err in sealing the jury questionnaires without a Bone-Club analysis) and In re Stockwell, 160 Wn. App. 172, 181 248 P.3d 576 (2011)(sealing of jury questionnaires does not constitute structural error). However, he respectfully requests that this Court stay its decision on this issue pending a decision by the Washington Supreme Court.

D. CONCLUSION

For the reasons stated, this Court should stay its decision pending a decision in State v. Tarhan, or in the alternative, remand to the trial court for resentencing.

DATED this 22nd day of January, 2012.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue, Tacoma, Washington 98402 and Lavester Alexander Johnson, King County Jail, 500 5th Avenue South, Seattle, Washington 98104.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of January, 2013 in Kent, Washington.

Valerie Marushige

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